IN THE UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRACTOR COMPANY d/b/a CCS, TRUCKING,	
Employer,	
and)	
TEAMSTERS LOCAL 727,	
INTERNATIONAL BROTHERHOOD)	Case Nos. 13-RC-22018 & 13-RC-67437
OF TEAMSTERS,	
Petitioner)	
and)	
LOCAL 707, TRUCK DRIVERS,	
CHAUFFEURS, WAREHOUSEMEN)	
AND HELPERS UNION,	
Petitioner.)	
)	

ANSWERING BRIEF ON BEHALF OF PETITIONER TEAMSTERS LOCAL UNION NO. 727 IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON ELECTION OBJECTIONS AND IN OPPOSITION TO PETITONER LOCAL 707'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON ELECTION OBJECTIONS

Petitioner Teamsters Local Union No. 727, pursuant to the Rules and Regulations of the National Labor Relations Board, Section 102.69, hereby submits its Answering Brief in Opposition to the Employer's Exceptions to the Hearing Officer's Report and in opposition to Petitioner Local 707's Exceptions to the Hearing Officer's Report on Election Objections and states as follows:

INTRODUCTION

On February 3, 2012, the Hearing Officer in the above-captioned matter determined that "the Employer engaged in conduct that interfered with employees' free choice by submitting an

incomplete *Excelsior* list," sustained Petitioner Local 727's Objections 1 & 2, and "recommend[ed] that a second election be conducted." (Hereinafter "Report" at p . 6). The Hearing Officer's recommendation to the Board was not in error. The undisputed evidence in this case demonstrates that the conduct of Tractor Company d/b/a/ CCS Trucking (hereinafter "Employer") during the election affected the outcome of the election and interfered with the employees' freedom of choice guaranteed under Section 7 of the Act.

STATEMENT OF FACTS

There have been no exceptions filed to the Hearing Officer's findings of facts in the Report issued on February 3, 2012. Accordingly, they are admitted as true and accurate by all parties.

ARGUMENT

As stated in <u>Automatic Fire Systems</u>, 357 NLRB No. 190 (2012), and <u>Thrifty Auto Parts</u>, 295 NLRB 1118 (1989), the Board "presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election." 295 NLRB at 1118. In the instant case, this presumption has not been rebutted by the Employer or Petitioner Local 707. Both Employer and Petitioner Local 707 filed exceptions only to the Hearing Officer's conclusion of law and recommendation in the Report that the election results be set aside and a re-run election held. The Employer's willful submission of a substantially incomplete *Excelsior* list to Region 13 and Petitioner Local 727 tainted this election, and the Hearing Officer properly held that on this basis alone, the election results must be set aside and the election rerun. In their Exceptions, both the Employer and Petitioner Local 707 wholly fail to grasp the purpose of the *Excelsior* list. Both seem to be under the misguided perception that the *Excelsior* list is merely a means to track voter eligibility at the time the polls open. It is not. It is, instead, a fundamentally necessary tool to ensure Section 7 rights to employees. That right was willfully violated, and the Employer's

excuses for the violations were properly characterized by the Hearing Officer as "disturbing." (Report at p. 11).

I. THE EMPLOYER ADMITS THAT ELECTION OBJECTIONS 1 AND 2 SHOULD BE SUSTAINED.

The Employer admits from the beginning of its Exceptions that Election Objection Nos. 1 & 2 should be sustained. Accordingly, the Employer is effectively admitting as true the following, which is the verbatim language of those Election Objections:

The Employer's conduct affected the results of the election when prior to the election, it willfully submitted a substantially inaccurate, misleading, and incomplete *Excelsior* list to the Region, which omitted employee Brian Powell, who is a regular part-time driver for the Employer and a known Local 727 referral hall member.

The Employer's conduct affected the results of the election when prior to the election, it willfully submitted a substantially inaccurate, misleading, and incomplete *Excelsior* list to the Region, which omitted employee Ken Kendal, who is a regular part-time driver, and purposely sent Kendal out of the state for business purposes for an extended period of time, which included the date of the election.

(Election Objections 1 & 2, Exhibit 1 to Report). By not challenging the Hearing Officer's finding that the above-referenced Election Objections should be sustained, the Employer is at the same time admitting that it willfully submitted a substantially inaccurate, misleading, and incomplete *Excelsior* list to the Region and that in doing so it necessarily affected the results of this election. It is now illogical and unpersuasive for the Employer to Except to an immediate re-run of the election where it has admitted that that its willful and misleading conduct affected the results of the first election. Accordingly, the Hearing Officer did not err in recommending that the results of the election be set aside and a rerun election held immediately.

¹ Petitioner 707 does not except to this finding.

II. THE HEARING OFFICER PROPERLY APPLIED WOODMAN'S AND APPLICABLE BOARD LAW AND PROPERLY DETERMIEND THAT THE ELECTION RESULTS HAVE BEEN TAINTED BY THE EMPLOYER'S VIOLATION OF THE EXCELSIOR RULE.

As the Board noted in Woodman's Food Markets, 332 NLRB 503 (2000), the case relied upon by the Employer in its Exceptions, "[t]he Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee's name [in this case Petitioner Local 727] suffers an obvious and pronounced disadvantage in communicating with that person by any means." 332 NLRB at 503, citing Women in Crisis Counseling, 312 NLRB 589 (1993), Thrifty Auto Parts, 295 NLRB 1118 (1989). It "clearly frustrates the policies underlying the Excelsior rule since the union may be denied the opportunity prior to the election to inform these voters of its position on the issues raised before the election." Id. The Board in Woodman's further explained that "employees have a Section 7 right to make a 'fully-informed' choice in an election, and ... the purpose of the Excelsior rule is to protect that right." 332 NLRB at 503. The Board continued to observe that the Excelsior rule is intended "to achieve important statutory goals by ensuring that all employees may be fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." Id., citing Mod Interiors, inc., 324 NLRB 164 (1997), citing North Macon Health Care Facility, 315 NLRB 359, 360-61 (1994). When names are omitted from an Excelsior list, as is the case in the instant matter, that Section 7 right protected by the Excelsior list is destroyed. Furthermore, that violation of an individual's Section 7 right is not remedied whether or not the individual votes or whether his or her vote is counted because the vote remains an uninformed vote due to the violation of the Excelsior rule. The only proper remedy, as recommended by the Hearing Officer, is to set aside the election results and rerun the election.

III. THE CLOSENESS OF THE VOTE SUPPORTS IMMEDIATELY SETTING ASIDE THE ELECTION RESULTS AND RERUNNING THE ELECTION.

In the primary case relied upon by the Employer in its Exceptions to the Hearing Officer's Report, Woodman's, the Board notes that it "has also long recognized that the closeness of the vote is a significant factor in *Excelsior* cases." <u>Id.</u> at 503, <u>citing Ben Pearson Plant</u>, 206 NLRB 532, 533 (1973), <u>Mod Interiors</u>, 324 NLRB at 164. In the instant case, there were three (3) votes for the Petitioner Local 727 and three (3) votes for Petitioner 707. Accordingly, due to the closeness of the vote, the election results should be immediately set aside and the election rerun under <u>Woodman's</u>.

IV. THE BOARD ONLY DECLINES TO SET ASIDE ELECTIONS WHERE THE NUMBER OF OMISSIONS CONSTITUTED ONLY A SMALL PERCENTAGE OF THE TOTAL NUMBER OF ELIGIBLE VOTERS.

Again, as noted in the case relied upon by the Employer in support of its Exceptions, Woodman's, only in some cases has the Board "declined to set aside the election on the ground that the number of omissions constituted only a small percentage of the total number of eligible voters." Id. at 503 (emphasis added). In noting this exception, the Board provided the example of Kentfield Medical Hospital, 219 NLRB 174, 175 (1975) where the omission was 5 names out of 82 eligible voters (or 6%). In the instant case, the omission rate is more than double that in Kentfield and is not consistent with the "small percentage" situation where the Board would even consider not rerunning the election. In the instant case, the Employer stated in its Exceptions that it "accepts the Hearing Officer's findings of fact that there were thirteen (13) eligible voters, of which two (2), Powell and Kendal, were omitted from the Excelsior list." (ER Exceptions at p. 2). If that fact is an accepted and admitted fact, then the omission rate is also accepted and admitted as

nearly 16%. ² Accordingly, under well-settled Board law, the Hearing Officer's primary recommendation should be adopted.³

V. THE NUMBER OF OMISISONS WAS DETERMINATIVE.

As explained in <u>Woodman's</u>, the case primarily relied upon by the Employer, whether the number of omissions was determinative in an election means, "whether it equals or exceeds the number of additional votes needed by the union to prevail in the election." <u>Id.</u> at 504. In the instant case, the Union needed only one vote to prevail, and the number of omissions was two. Accordingly, the omissions were determinative under <u>Woodman's</u>.

VI. THE EMPLOYER'S EXPLANATIONS FOR THE OMISSIONS ARE NOT CONVINCING AND DO NOT REMEDY THE SECTION 7 VIOLATIONS.

In its Exceptions, the Employer states that it "does not take Exception to the Hearing Examiner's recommended finding that Powell and Kendal should have been included on the *Excelsior* list." (Exceptions at p. 10). In other words, the Employer admits that—legally—Powell and Kendal should have been on the *Excelsior* list. If names should have been on the *Excelsior* list as a matter of law, then it is logically impossible to claim there was a legally sufficient reason for omitting names that—admittedly—should have been legally included on the *Excelsior* list.

Assuming arguendo that the Employer did not act in bad faith, the analysis does not end as suggested by the Employer in its Exceptions. (ER Exceptions at p.7-10). The Board notes in Woodman's that "absent bad faith, an employer's explanation will be considered as a factor in the

² The rate calculated at 2/13 = 15.384615%

³ See, e.g., Thrifty Auto Parts, Inc., supra (9.5 percent); Avon Products, Inc., 262 NLRB 46, 48 fn. 5 (1982) (citing cases); EDM of Texas, 245 NLRB 934, 934, 940 (1979) (10.67 percent omissions and 17.9 percent inaccuracies); Sonfarrel, Inc., 188 NLRB 969, 969-970 (1971) (11 percent); Gamble Robinson Co., 180 NLRB 532, 532-533 (1970) (11 percent).

analysis." 332 NLRB at 504, fn12 (emphasis added). According to well settled Board law, this "factor" is analyzed under a "legally sufficient" standard. In Woodman's, the Board found that the Employer's explanation of "incorrectly interpret[ing] the payroll eligibility requirement" and that the "payroll department may have committed errors" were not legally sufficient and demonstrated "a lack of diligence and due care by the Employer." Id. at 504. In the instant case, the Employer omitted Powell from the Excelsior list despite including individuals with similar work schedules and patterns. (Report at p. 11).⁴ The Employer's defense that there was no harm in omitting Powell from the Excelsior list because Powell seasonally works in the movie industry, which is under the jurisdiction of Petitioner Local 727, is equally unpersuasive and does not cure the Excelsior violation. Without notification of Powell's employment at CCS via the Excelsior list, Petitioner Local 727 had no knowledge that Powell (one out of almost 7000 union members) should be contacted regarding the election at CCS. The Employer's argument further assumes that because an individual is a union member, he or she is fully knowledgeable about the union and the union's role as a bargaining representative at this particular location. By willfully omitting Powell's name from the Excelsior list, his Section 7 rights were, nevertheless, violated and not corrected because he occasionally works in the movie industry covered by contracts within Petitioner Local 727's jurisdiction. Accordingly, the Hearing Officer properly determined that, while perhaps not bad faith, the reason for this omission was not legally sufficient and even "disturbing." (Report at p. 11).

The Employer's reasons for omitting Kendal from the list were, likewise, legally insufficient and "equally disturbing." (Report at p. 11). The Hearing Officer properly found the Employer's alleged reasons for omitting Kendal from the *Excelsior* list are undercut by its own

⁴ Neither the Employer nor Petitioner Local 707 have excepted to the Hearing Officer's findings of fact.

evidence it presented at hearing: "The Employer's own payroll records run counter to their argument as these records show that when Livsey Sr., returned to work in November 2011, Kendal continued to work as well." (Report at p. 11). This omission was willful by the Employer as demonstrated by Kendal's unrebutted testimony:

He [Jeff Rizzi] asked if I would do him a favor and go to Florida, yes, because one of the other drivers, Jesse, needed to vote, and I wasn't going to get, I wasn't voting, I wasn't going to get to vote, so he asked me if I would do him a favor and go to Florida.

(Tr. 31). Accordingly, because the record evidence (presented by the Employer) undercuts its own alleged reasons for omitting Kendal's name from the *Excelsior* list, and this omission was willful by the Employer, the alleged reasons appear pretextual. Pretextual reasons for Employer conduct are not a "legally sufficient" explanations for an *Excelsior* rule violation. Accordingly, the Hearing Officer did not err in finding that "[b]ased on the record testimony and evidence, the Employer failed to provide sufficient grounds for Kendal's omission from the *Excelsior* list." (Report at p. 11).

VII. AUTOMATIC FIRE SYSTEMS IS ENTIRELY ON POINT TO THE INSTANT MATTER AND SHOULD BE FOLLOWED BY THE BOARD.

The Employer's argument that <u>Automatic Fire Systems</u>, 357 NLRB No. 190 (2012), is distinguishable from the instant case is without merit. To the contrary <u>Automatic Fire Systems</u> is wholly on point and should be followed by the Board in the consideration of the instant matter.

As a threshold matter, the Employer's argument regarding <u>Automatic Fire Systems</u> implies that there is a three part test in *Excelsior* rule omission cases. However, the <u>Automatic</u> Board states, instead,

<u>Woodman's</u> did not establish a three-part test under which each part must be satisfied for an election to be set aside. Rather, the <u>Woodman's</u> Board adopted a more flexible approach under which other factors "including whether the number of omissions is determinative" would be considered. The Board's adoption of that approach was

motivated by concern over instances in which the number of names omitted from an *Excelsior* list was small, but nonetheless those employees were potentially determinative.

357 NLRB No. 190 at *6 (emphasis in original)(citations omitted). In the instant case, the number of names omitted from the *Excelsior* list is not small—it was, as admitted by the Employer, almost 16%.⁵ Accordingly, considering the determinative nature of the omissions is not necessary in this case because this is not an instance in which the number of names omitted from the *Excelsior* list was small.

Furthermore, as stated in <u>Automatic Fire Systems</u>, "there is no basis to conclude," as the Employer does, "that the Board intended its new approach to bar setting aside elections where the percentage of omitted employees is high and where the employer's explanation for the omissions is not legally sufficient." <u>Id.</u> As in <u>Automatic Fire Systems</u>, "[t]hat is the situation here." <u>Id.</u> The instant case is one where there is a high percentage of omitted employees (as admitted by the Employer—ER Exceptions at p. 2), and, as argued <u>supra.</u>, the Employer's explanations for the omissions are not legally sufficient. Even assuming arguendo that this was a case where the determinative nature of the omissions would be considered, under <u>Automatic Fire Systems</u>, they were determinative. In that case, the Board found that "the number of omitted employees and challenged voters combined was potentially outcome determinative." In the instant case, the vote was 3 votes for Petitioner Local 727 and 3 votes for Petitioner Local 707. Any combination of the remaining 6 challenged (Powell being an omitted individual) and additional one omitted name (Kendal) would be potentially determinative in this case.

Clearly, the Employer's argument (as well as Petitioner's Local 707's argument) fails

⁵ See, e.g., Thrifty Auto Parts, Inc., supra (9.5 percent); Avon Products, Inc., 262 NLRB 46, 48 fn. 5 (1982) (citing cases); EDM of Texas, 245 NLRB 934, 934, 940 (1979) (10.67 percent omissions and 17.9 percent inaccuracies); Sonfarrel, Inc., 188 NLRB 969, 969-970 (1971) (11 percent); Gamble Robinson Co., 180 NLRB 532, 532-533 (1970) (11 percent).

under Automatic Fire Systems and settled Board law considering Excelsior list omissions.

Accordingly, the Hearing Officer did not err when he recommended that the election results be set

aside and a rerun election conducted immediately. As the Board in Automatic Fire Systems

decided, the Board in this case should "agree with the hearing officer's primary recommendation

to set aside the election." 357 NLRB No. 190 at *2.

CONCLUSION

For all of the foregoing reasons, the Board should deny of the Employer's exceptions and

deny Petitioner Local 707's exceptions to the Hearing Officer's Report and adopt the Hearing

Officer's primary recommendation to set aside the election results and rerun the election

immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney, Stephanie K. Brinson, hereby certifies under penalty of perjury under the laws of the State of Illinois that on February 24, 2012, she caused to be served upon the person(s) listed below in the manner shown Petitioner Teamsters Local 727's Answering Brief in Opposition to the Employer's Exceptions to the Hearing Officer's Report and in opposition to Petitioner Local 707's Exceptions to the Hearing Officer's Report on Election Objections, was served on the following parties via the method(s) indicated:

VIA ELECTRONIC FILING AND UPS NEXT DAY

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